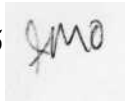


DATE: November 26, 2003

TO: Darsi Foss - RR/3
Brownfields Section Chief

FROM: Judy Mills Ohm - LS/5
Legal Counsel



SUBJECT: Legal Opinion regarding application for Brownfields Revolving Loan Fund

You have requested a legal opinion on the following two questions regarding your application for a Brownfields revolving loan fund from the United States Environmental Protection Agency ("USEPA"):

1. Does the Wisconsin Department of Natural Resources ("WDNR") have legal authority to access and secure sites in the event of an emergency or default of a loan agreement or non-performance under a sub-grant?
2. Does WDNR have legal authority to perform the actions necessary to manage a revolving loan fund, such as the ability to hold funds, make loans, enter into loan agreements and collect repayments?

This memo will provide you with a legal opinion on these two questions.

1. WDNR has the legal authority to obtain access to properties and to secure them in the event of an emergency or default of a loan agreement or non-performance under a sub-grant, in order to take environmental repair action at a site or facility, or if entry is necessary to prevent increased damage to the air, land or waters of the state.

WDNR has legal authority to obtain access to properties under ss. 292.1 1(8) and 292.31(3)(e), Wis. Stats. Section 292.1 1(8), Stats., provides as follows:

292.11 (8) Access to property and records. Any officer, employee or authorized representative of the department, upon notice to the owner or occupant, may enter any property, premises or place at any time for the purposes of sub. (7) if the entry is necessary to prevent increased damage to the air, land or waters of the state, or may inspect any record relating to a hazardous substance for the purpose of ascertaining the state of compliance with this section and the management rules promulgated under this section. Notice to the owner or occupant is not required if the delay attendant upon providing it will result in imminent risk to public health or safety or the environment.

There is similar language in s. 292.31(3)(e), Stats., which relates to environmental repair actions at designated sites or facilities:

292.31 (3)(e) Access to property. Any officer, employee or authorized representative of the department may enter onto any site or facility and areas surrounding the site or facility at reasonable times and upon notice to the owner or occupant to take action under this section. Notice to the owner or occupant is not required if the delay required to provide this notice is likely to result in an imminent risk to public health or welfare or the environment.

One of these two statutes would most likely apply in cases in which WDNR would make a loan or a grant under the revolving loan fund. WDNR could obtain access to any site or facility, under these statutes, to determine whether the site or facility is in compliance with the law regarding hazardous substance discharges, upon providing notice to the owner or occupant, in either emergency or non-emergency situations. If immediate access was necessary in order to prevent imminent harm to the environment, notice to the owner or occupant would not be required. In addition, if the owner of the property denied access to the property, WDNR has the authority to obtain a special inspection warrant in order to gain access to the property. This authority is found in s. 66.0119(2), Wis. Stats., which provides as follows:

66.0119 (2) A peace officer may apply for, obtain and execute a special inspection warrant issued under this section. Except in cases of emergency where no special inspection warrant is required, special inspection warrants shall be issued for inspection of personal or real properties which are not public buildings or for inspection of portions of public buildings which are not open to the public only upon showing that consent to entry for inspection purposes has been refused.

Thus, WDNR would have the authority under these statutes to access and secure sites in the event of an emergency or default of a loan agreement or non-performance under a sub-grant.

2. WDNR has the legal authority to perform the actions necessary to manage a revolving loan fund (such as the ability to hold funds, make loans, enter into loan agreements and collect repayments) and WDNR is pursuing legislation to obtain additional legal authority to perform those actions necessary to manage a revolving loan fund.

Under s. 20.370(6)(cm), WDNR has legal authority to receive and hold moneys from the federal government to aid localities. Therefore, WDNR could receive the money from the USEPA for the revolving loan fund and could hold the money in this appropriation.

Applicants who are successful in obtaining a Revolving Loan Fund will be allowed to award some of the money as grants and some as loans. WDNR and the other members of the Coalition applying for the Revolving Loan Fund currently administer a number of Brownfield grant programs and loan programs. WDNR administers the following programs:

1. Brownfield site assessment grant (SAG) program under s. 292.75, Wis. Stats. This program provides grants to local governments from the appropriation

under s. 20.370(6)(et) for the purpose of conducting environmental investigation of environmental contamination at eligible sites or facilities and conducting certain removal actions at those sites or facilities. Grant recipients must provide a minimum match of 20% of the amount of the grant. Each recipient is required to sign a contract that includes enforceable conditions and sanctions if the grantee does not meet the conditions of the program.

2. Brownfield green space grant program under s. 292.79, Wis. Stats. This program provides grants to local governments for projects to remedy environmental contamination of brownfields, if the project will have a long-term public benefit, including the preservation of green space the development of recreational areas, or the use of a property by the local government. Grant recipients must provide a match of 20% to 50% of the amount of the grant. Each recipient is required to sign a contract that includes enforceable conditions and sanctions if the grantee does not meet the conditions of the program.
3. Sustainable urban development zone ("SUDZ") program under s. 292.77, 2001-2002 Wis. Stats. This program has been used to provide funds to certain municipalities to investigate environmental contamination and conduct cleanups of Brownfields.
4. Land recycling loan program under s. 281.60, Wis. Stats. This program provides financial assistance (through loans) to local governments for projects to remedy environmental contamination of sites or facilities at which environmental contamination has affected or threatens to affect groundwater or surface water.

Wisconsin's Department of Administration ("WDOA") works with WDNR to administer the clean water fund program, safe drinking water loan program and land recycling loan program, which include revolving loan funds (s. 281.59(2), Wis. Stats.). These loan programs include authority to enter into financial assistance agreements with applicants, to collect repayments and to collect the amount of any unpaid loan balance by deducting that amount from any state payments due the municipality (s. 281.59(2) and (11), Wis. Stats.).

WDNR is also pursuing legislation that would allow it to administer a loan program, specific to the money it may receive through the USEPA Revolving Loan Fund program. In administering the SUDZ programs, WDNR has utilized the authority under s. 66.0301, Wis. Stats., to enter into intergovernmental agreements with municipalities in order to disperse grant money to the municipalities. That statute states that it is to be interpreted liberally in favor of cooperative action between municipalities (including the State and State agencies) and between municipalities and federally recognized Indian tribes and bands. The statute also provides that such agreements or contracts may include provisions for the deposit and disbursement of funds appropriated. The relevant provisions of the statute are as follows:

66.0301(2) In addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, unless those statutes specifically exclude action under this section, any municipality may contract with other municipalities and with federally recognized Indian tribes and bands in this state, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law. If municipal or tribal parties to a contract have varying powers or duties under the law, each may act under the contract to the extent of its lawful powers and duties. A contract under this subsection may bind the contracting parties for the length of time specified in the contract. This section shall be interpreted liberally in favor of cooperative action between municipalities and between municipalities and Indian tribes and bands in this state.

(3) Any contract under sub. (2) may provide a plan for administration of the function or project, which may include but is not limited to provisions as to proration of the expenses involved, deposit and disbursement of funds appropriated, submission and approval of budgets, creation of a commission, selection and removal of commissioners, and formation and letting of contracts.

If legislation is passed that authorizes WDNR to administer a separate loan program specific to the money it may receive from the USEPA Revolving Loan Fund program, WDNR could utilize s. 66.0301, Wis. Stats., to enter into loan agreements with municipalities and federally recognized Indian tribes. The agreements could specify the terms of the loans, including how loan repayments would be made.

In addition to the WDNR grant and loan programs, two other Wisconsin State agencies administer grant programs relating to Brownfields. The Department of Commerce administers the Brownfields Grant program under s. 560.13, Wis. Stats. This program awards grants based on the potential of the project to promote economic development in the area, whether the project will have a positive effect on the environment, the amount and quality of the recipient's contribution to the project and the innovativeness of the proposal. Also, the Department of Administration administers a Coastal Management program, which awards grants to eligible projects that protect or improve water quality in counties along the shores of Lake Michigan and Lake Superior. Examples of eligible projects include projects relating to public access, waterfront redevelopment, cleanup of brownfields, preservation of wetlands and land use planning.

Thus, the members of the Coalition have the current legal authority to perform the actions necessary to manage USEPA's Brownfields Revolving Loan Fund, such as the ability to hold funds, make loans, enter into loan agreements, collect repayments, and collect the amount of any unpaid loan balance if the loan recipient defaults on the loan. In addition, the members of the Coalition are pursuing legislation that would clearly authorize a separate loan program, specific to the money the Coalition hopes to receive from the USEPA Revolving Loan Fund program.